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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ERICKA MARTINEZ, Defendant and Appellant.	H042513 (Monterey County Super. Ct. No. SS110125B)

After revoking defendant's felony probation and imposing a 16-month sentence for possession of concentrated cannabis, the trial court recalled that sentence and resentenced defendant for misdemeanor concentrated cannabis possession pursuant to Proposition 47's resentencing procedure. On appeal, defendant argues that she fell outside the scope of the recall process and was entitled to retroactive application of the new misdemeanor classification of the cannabis offense or to prospective resentencing only as a misdemeanant under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). In the alternative, she challenges imposition of the felony sentence as a condition precedent to her resentencing under Proposition 47. For the reasons explained herein, we reject the retroactivity argument, and we will affirm the Proposition 47 resentencing order. We will reverse the order revoking probation and imposing a felony sentence because we conclude that defendant was prejudiced by the trial court's misunderstanding of its discretion to grant the resentencing petition without first imposing a felony sentence.

I. BACKGROUND

In 2012 defendant Ericka Martinez was convicted of possession of concentrated cannabis, a felony. (Health & Saf. Code, § 11357, subd. (a).) Imposition of sentence was suspended and defendant was placed on probation for three years. The court imposed a $240 restitution fund fine (Pen. Code, § 1202.4, sub. (b)(1)),[1] and a suspended probation revocation restitution fine in the same amount (§ 1202.44). In February 2015, the probation department filed a second notice of probation violation and petition to modify, revoke, or terminate probation. The notice alleged that defendant failed to complete the Day Reporting Center program, failed to complete community service work as a consequence of her discharge from the program, and twice failed to attend scheduled appointments at the probation office. The probation department recommended that defendant serve 365 days in county jail and that probation terminate upon completion of the custody time.

The court issued a bench warrant after defendant failed to appear for arraignment on the probation violation. After her arrest two months later, defendant filed a petition for recall of sentence and resentencing under Proposition 47. (§ 1170.18, subd. (a).) Defendant admitted the probation violation, and the court ordered a supplemental probation report for a recommendation taking into account the Proposition 47 petition, commenting: "[T]here is a recommendation here that I hadn't really focused on before, … I don't know if they were doing it based on an accepted Prop 47 motion or what. [¶] … I think I'm still going to get a supplemental report and make a determination whether or not it will be before we do the sentence."

The supplemental report recommended that probation be revoked, sentence be imposed, and defendant be ordered to pay the outstanding restitution fund fine balance and the suspended probation revocation restitution fine.

[1] Undesignated statutory references are to the Penal Code.

The parties returned to court in June 2015 for sentencing on the probation violation and adjudication of the Proposition 47 resentencing petition. The court announced that the matter was on for sentencing on a supplemental report. Defense counsel noted, "It's also on for the Prop 47 petition." The court asked whether the district attorney had responded to the resentencing petition, and the prosecutor orally submitted that matter. The count continued: "So I think the appropriate thing to do is to take up the petition first." The prosecutor interjected, "Please," and the court responded, "Well, so what I would -- let me just take a moment here. [¶] So what is your recommendation, Mr. [Prosecutor]?" The prosecutor recommended that defendant "be sentenced for the petition, and then the Court take the appropriate action on the Prop 47 issue." The court responded, "Well, so in order to grant the Prop 47 petition I have to sentence her to prison first. So I would intend to sentence her to -- sentence her first on the violation of probation. And the sentence would be a prison sentence, 1170(h) sentence, and then that pretty much takes care of it." Rejecting defendant's request for resentencing under Proposition 47 before addressing the probation violation, the court explained, "So Prop 47 does not allow a reduction. It requires that the defendant -- if a defendant has served a term or is serving a term, it can be designated a misdemeanor. I intend to impose the sentence, as this Court does on a regular basis, and then grant the petition." The court addressed the probation violation first, after counsel persisted, "I understand how the Court is doing it. But I think the courts are misreading the term 'sentence.' I think sentence includes probation. And I think the Court does not have to sentence to a prison term before granting Prop 47 relief."

The court found defendant no longer suitable for probation. It imposed the lower term of 16 months and the previously suspended $240 probation revocation restitution fine. Next, it granted defendant's petition to recall sentence. Defendant was resentenced to 212 days in county jail with credit for time served for a misdemeanor Health and

Safety Code section 11357, subdivision (a) conviction, ordered to pay all fines and fees previously imposed, and placed on parole for one year.

II. DISCUSSION

Voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, on November 4, 2014. Proposition 47 reclassified as misdemeanors certain felony theft and drug offenses, including possession of concentrated cannabis. In addition, Proposition 47 established a resentencing procedure for persons currently serving felony sentences for the reclassified offenses (§ 1170.18, subds. (a)–(b)), and a remedy allowing for persons with completed sentences on reclassified offenses to have those convictions designated as misdemeanors (§ 1170.18, subds. (f)–(g)). Under subdivision (a) of section 1170.18 (hereafter section 1170.18(a)), a person "currently serving a sentence" for a felony conviction may petition for recall of a sentence if the person would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense. Upon receipt of a resentencing petition, the trial court must recall the felony sentence and resentence the person to a misdemeanor unless he or she has a disqualifying prior conviction, or the court determines resentencing would pose an unreasonable risk to public safety. (§ 1170.18, subds. (b), (i).)

Defendant argues that she is entitled to automatic application of new Health and Safety Code section 11357, subdivision (a), designating possession of concentrated cannabis a misdemeanor offense as of November 5, 2014. Although she committed the drug offense in 2009 when it was classified as a felony, defendant argues that she is entitled to retroactive application of the new misdemeanor designation under *Estrada* because the trial court had not imposed a sentence for the conviction before Proposition 47's effective date, and thus no final judgment had been entered in her case. She argues that she is not subject to resentencing under section 1170.18, arguing that a grant of probation is not a "sentence" or "judgment of conviction" as those terms are used in section 1170.18(a). She contends that limiting the recall process to those "currently

serving a sentence" manifests an intent that unconditional redesignation apply to nonfinal judgments such as hers, and that retroactive reclassification of convictions for offenses newly designated as misdemeanors must apply to probationers so as not to exclude them from relief under Proposition 47.

Alternatively, defendant argues that she is entitled to prospective imposition of a misdemeanor sentence because she had not been sentenced before passage of Proposition 47. According to defendant, the only sentence the trial court had authority to impose after revoking probation post-Proposition 47 was a misdemeanor sentence.

A. DEFENDANT IS SUBJECT TO PROPOSITION 47'S RECALL/RESENTENCING PROCESS

The retroactivity of a statute is a matter of legislative intent. (*People v. Brown* (2012) 54 Cal.4th 314, 319.) In contrast to the general presumption against retroactivity of criminal statutes as stated in section 3 of the Penal Code, the California Supreme Court in *Estrada* recognized a presumption of retroactivity for statutory amendments lessening criminal punishment in the absence of an express indication of intent otherwise. (*Estrada*, *supra*, 63 Cal.2d at pp. 744–745.) But the court has since clarified that the narrow *Estrada* presumption is not implicated when the Legislature "clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent[.]" (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.)

We join a number of courts in concluding that the retroactivity presumption recognized in *Estrada* does not apply to Proposition 47.[2] In *People v. Davis* (2016) 246 Cal.App.4th 127, review granted July 6, 2016, case No. S234324 (*Davis*), the court observed that the Proposition 47 electorate "spoke with exceptional precision about the intended retroactive application of the changes to [the] criminal law at issue." (*Id*. at p. 136.) The *Davis* court concluded that by specifying the precise manner in which the

[2] The lead case before the California Supreme Court addressing retroactivity of Proposition 47 is *People v. DeHoyos*, review granted Sept. 30, 2015, case No. S228230.

ameliorative statutory changes would impact persons sentenced under prior law, section 1170.18 served as the functional equivalent of a saving clause for Proposition 47, in the same way the resentencing scheme enacted under Proposition 36 two years earlier served as the functional equivalent of a saving clause precluding application of the *Estrada* retroactivity presumption to persons sentenced under the original Three Strikes law. (*Davis*, at pp. 136–137.)[3] By establishing the statutory recall procedure, the electorate made clear its intent as to the nature and extent of the retroactive application of the newly designated misdemeanor offenses as to persons who either were " 'currently serving a sentence' " or had completed a sentence for an offense reduced to a misdemeanor by Proposition 47. (*Id.* at p. 137.)

The *Davis* court next addressed the critical question whether persons under a grant of probation are " 'serving a sentence,' " as that term is used in section 1170.18(a), because if those probationers come within the ambit of the statutory resentencing procedure, "there is no need, and no place, for inferences about retroactive application, and therefore no basis for invoking *Estrada.*" (*Davis*, *supra*, 246 Cal.App.4th at p. 137.) The court recognized that the phrase " 'serving a sentence' " could mean serving a term of confinement or be understood as encompassing a criminal punishment more generally, including a term of probation. (*Id*. at pp. 139–140.) In the *Davis* court's view, the electorate viewed the phrase more broadly than serving a term of confinement because the Proposition 47 Voter Guide described placement on probation as a way in which " '[o]ffenders convicted of felonies can be sentenced,' " and explained that misdemeanor offenders " 'may be sentenced to county jail, county community supervision, a fine, or some combination of the three.' " (*Id.* at p. 141.) Considering the purpose and public policy underlying Proposition 47, the court concluded that the definition of " 'currently

[3] The California Supreme Court rejected the Proposition 36 retroactivity argument in *People v. Conley* (2016) 63 Cal.4th 646 shortly after *Davis* was issued.

serving a sentence' " is inclusive, encompassing probationers as well as persons sentenced to prison. (*Id*. at p. 142.)

This court also has rejected the argument that a defendant on probation is not "serving a sentence" within the meaning of section 1170.18(a). In *People v. Garcia* (2016) 245 Cal.App.4th 555 (*Garcia*), we observed that nothing in Proposition 47's ballot materials nor in the text of the initiative itself limited the section 1170.18(a) phrase " 'person currently serving a sentence for a conviction' " to persons currently serving prison terms, or otherwise manifested an intent to distinguish between felony probation and prison sentences for resentencing purposes. (*Garcia*, at pp. 558–559.) Indeed, we noted that section 1170.18, subdivision (b) provides for recall of a "felony sentence" without distinguishing felony probationers from prisoners, that courts have considered an order suspending imposition of sentence and imposing probation to be a form of sentencing, and that probation is considered a sentencing choice under the rules of court. (*Garcia*, at pp. 557–559.) Finally, we reasoned that it would be incongruous to limit the recall procedure under section 1170.18 to persons serving prison terms for nonserious offenses newly designated as misdemeanors given that many of the targeted offenders would be on probation, not serving prison terms, for those offenses. (*Garcia*, at p. 559.)

We agree with the analyses in *Davis* and *Garcia* and apply their holdings here. (See also *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328, 1336 [challenge to sentencing enhancement based on offense designated misdemeanor under Proposition 47 premature because no redesignation application under section 1170.18, subdivision (f) filed; *Estrada* presumption defeated by intent of Proposition 47]; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313–314 [*Estrada* retroactivity argument rejected; defendants who have completed felony sentences for offenses designated misdemeanors under Proposition 47 limited to statutory remedy in section 1170.18, subdivision (f) during pendency of appeal].) Because defendant, a probationer, was currently serving a sentence within the meaning of section 1170.18(a), she was subject to that statutory recall

provision as the sole means of having her felony conviction reclassified as a misdemeanor. She was not entitled to automatic reclassification of the offense as a misdemeanor, nor was she entitled to resentencing outside the scope of the statutory recall procedure.

B. THE TRIAL COURT'S MISUNDERSTANDING OF ITS SENTENCING DISCRETION WAS PREJUDICIAL

Having rejected defendant's retroactivity argument, we consider whether the trial court committed prejudicial error by sentencing her on the probation violation before granting the recall petition under the mistaken belief that it could not grant the petition without first imposing a sentence. Respondent argues that no error occurred because the trial court had the inherent authority to adjudicate the probation violation before the Proposition 47 petition, and that no prejudice resulted "given the court's stated preference for adjudicating the probation violation[] first."

Although the trial court has "inherent power … to exercise reasonable control over all proceedings … to insure the orderly administration of justice" (*Rutherford v. Owens-Illinois, Inc*. (1997) 16 Cal.4th 953, 967), the record shows that the court's decision to sentence defendant on the probation violation was not based on its inherent power to control proceedings. Rather, it was based on the misunderstanding that defendant could not be resentenced under Proposition 47 as a probationer. An abuse of discretion occurred here because the court did not understand that it had the discretion to grant defendant's resentencing petition without first revoking defendant's probation and imposing sentence. (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803–804 [a trial court's misunderstanding of the scope of its sentencing authority constitutes an abuse of discretion].)

We find the error to be prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836. The court followed the prosecutor's suggestion that defendant be sentenced on the probation violation first, and it adopted the probation department's new sentencing

recommendation. The prosecutor's silence following defendant's argument that a sentence under section 1170.18(a) includes probation suggests that he, too, may have been unclear about the trial court's sentencing discretion. Had all parties understood defendant's eligibility for resentencing as a probationer, we see a reasonable probability that the court would have adjudicated the recall petition first, obviating the need for a sentence on the probation violation which resulted in the imposition of the previously suspended $240 probation revocation fine.

III. DISPOSITION

The June 25, 2015 order granting the recall petition and resentencing defendant is affirmed.

The June 25, 2015 order revoking and terminating probation, imposing a 16-month sentence, and imposing the previously suspended $240 probation revocation fine is reversed. The matter is remanded to the trial court for reconsideration of disposition as to defendant's probation violation. In exercising its discretion, the court may reimpose the revocation, felony sentence, and fine nunc pro tunc to June 25, 2015, or it may choose instead to terminate probation nunc pro tunc to June 25, 2015, given the disposition of the recall petition.

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Grover, J.

WE CONCUR:

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Rushing, P.J.

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Premo, J.

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